BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHRISTINE L. GRABBE	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,026,145
LABONE, INC., and QUEST DIAGNOSTICS	)	& 1,028,367
Respondents	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY and	)	
TRAVELERS PROPERTY AND CASUALTY	)	
INSURANCE COMPANY	)	
Insurance Carriers	)	

ORDER

Respondent Quest Diagnostics and Travelers Property and Casualty Insurance Company (Travelers) appeal the April 8, 2009, Award of Administrative Law Judge Marcia L. Yates Roberts (ALJ). After consideration of claimant's preexisting functional impairments from work-related injuries and surgeries before claimant's employment with either Quest Diagnostics or LabOne, Inc., claimant was awarded benefits for a 34 percent right upper extremity functional impairment at the level of the shoulder and a 15 percent left upper extremity functional impairment at the level of the shoulder, both based on the opinion of board certified cosmetic and reconstructive surgeon Gary L. Baker, M.D.

Claimant appeared by her attorney, Sally G. Kelsey of Lawrence, Kansas. Respondent LabOne, Inc. (LabOne) and its insurance carrier Liberty Mutual Insurance Company (Liberty Mutual) appeared by their attorney, Jason M. Lloyd, of Kansas City, Missouri. Respondent Quest Diagnostics (Quest) and its insurance carrier Travelers appeared by their attorney, Katharine M. Collins of Overland Park, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. In addition, at oral argument to the Board, the parties stipulated that the final functional impairment rating determinations of the ALJ in the Award granting claimant a 15 percent loss of use of the left upper extremity at the level of the shoulder and a 34 percent loss of use of the right upper extremity at the level of the

shoulder are appropriate. Therefore, the Board shall utilize those as the final ratings in this matter. The Board heard oral argument on August 5, 2009.

ISSUES

1. What is the date of accident applicable to this case? Did the ALJ err in determining that claimant's date of accident in this matter is March 20, 2007, the date claimant was taken off work to undergo an arthroscopic right rotator cuff surgery? Respondent Quest argues that claimant's problems in her right shoulder were the result of a specific traumatic incident and not a series of accidents. Therefore, the date of accident should be the date the incident occurred, and not the day claimant was taken off work for the surgery pursuant to K.S.A. 2006 Supp. 44-508(d). Claimant and respondent LabOne argue that the date used by the ALJ is appropriate, as claimant has suffered many upper extremity traumas while working for both LabOne and Quest. Therefore, the rules for determining an appropriate date of accident for repetitive trauma injuries set forth in K.S.A. 2006 Supp. 44-508(d) apply to these work-related injury claims.

2. Did the ALJ err in awarding benefits against respondent Quest and its insurance carrier Travelers? Quest argues that claimant suffered many of her physical problems while working for LabOne and/or after claimant left Quest and began working for Pitney Bowes. LabOne and claimant argue that the Award of the ALJ should be affirmed.

FINDINGS OF FACT

Claimant began working for LabOne on April 26, 2000, doing data entry work. Claimant's prior work and injury history is significant in that she had developed tendinitis, bilateral carpal tunnel syndrome and bilateral de Quervain's while working for Johnson County beginning in August 1997. Claimant underwent bilateral carpal tunnel releases and bilateral de Quervain's releases with Barry A. Rose, M.D., and settled the matter in 2000 in Docket No. 236,981, for a combined rating of 12.5 percent to the whole body.

Claimant's job with LabOne involved constant data entry and was hand intensive. She began having problems with her hands in March 2002 and was initially evaluated by Dr. Garcia, with a referral to plastic surgeon John M. Quinn, M.D., on April 18, 2002. Claimant was again diagnosed with bilateral tendinitis and de Quervain's. Claimant was

treated with cortisone injections which provided only temporary relief. Claimant was referred to plastic surgeon Lynn D. Ketchum, M.D., for an evaluation. Dr. Ketchum took x-rays and suggested physical therapy. Claimant was ultimately returned to her regular duties for respondent.

As of September 25, 2005, claimant held the position of insurance specialist II. This job also involved hand-intensive repetitive labor. Claimant transferred from the insurance specialist II position into the mailroom, another hand-intensive job. In the mailroom, claimant did a lot of lifting, grabbing and gripping. The hand-intensive work was almost constant. Claimant used a large industrial staple remover to remove staples from applications with up to 35 pages. This caused her ongoing hand problems. By March 2006, claimant had developed right shoulder problems and by March 8, 2006, she sought treatment with her personal physician, Mary Ann Campbell, M.D., because she was unable to move her shoulder. Claimant was referred to board certified orthopedic surgeon Charles E. Rhoades, M.D., and was diagnosed with right shoulder impingement syndrome and possible partial rotator cuff tear. Claimant underwent repair surgery on March 20, 2007, with a final impairment of 7 percent to the right upper extremity.

Claimant was terminated from her employment with respondent on June 23, 2007, after a disagreement arose stemming from an allegation that claimant failed to give timely notice of FMLA leave. Claimant testified to giving the appropriate notice of her intent to leave after working an 8-hour shift, but respondent contended that the appropriate notice was not given and claimant was terminated.

Claimant continued to have upper extremity problems after her termination, and was referred by respondent Quest and its insurance carrier Travelers to board certified plastic and hand surgeon O. Allen Guinn, III, M.D., for an evaluation on August 16, 2007, for bilateral upper extremity complaints. While Dr. Guinn was instructed to evaluate only claimant's left ring finger, he took the liberty to evaluate claimant's other complaints as well. Claimant was diagnosed with mild right ulnar neuritis, a variation of "tennis elbow" on the right side, degenerative changes in both wrists and thumb CMC joints, and a mass on her left ring finger, possibly a ganglion cyst. Claimant underwent surgery on October 5, 2007, for left cubital tunnel syndrome and for the removal of the mass on her left ring finger. The only injury history provided to Dr. Guinn involved paperwork for respondent and the use of the industrial staple remover. When claimant was examined by Dr. Guinn on November 8, 2007, her left upper extremity was greatly improved. However, her right upper extremity displayed intermittent lateral elbow discomfort and hand numbness. Claimant was diagnosed with mild carpal tunnel syndrome. On December 13, 2007, Dr. Guinn rated claimant at 5 percent to the left elbow. No rating was given for the right upper extremity.

On January 9, 2008, claimant began working for Pitney Bowes. Her new job did not involve removing staples, which is the activity claimant testified caused all of her

prior problems. Claimant testified that her symptoms did not worsen with her new job at Pitney Bowes.

When claimant was examined by Dr. Guinn on March 27, 2008, the median and lateral aspect of her right elbow was painful. Additionally, pain extended beyond the lateral epicondyle into the cubital tunnel area. Dr. Guinn's work history from claimant indicated significant repetitive use of her arms, which is different from the job description provided by claimant. He determined that the new job had worsened her carpal tunnel syndrome and caused the onset of cubital tunnel and radial tunnel syndrome. Dr. Guinn did question the timing of the cubital tunnel and radial tunnel syndromes after only two months on the new job. Additionally, he questioned claimant's activities during the period from September 2007 to January 2008, cautioning that an accounting needed to be made for this period of time, and the effect claimant's activities during this time period would have had on her physical problems. His professional opinion was that some activity that claimant had been doing since September 2007 had worsened claimant's carpal tunnel and caused the cubital tunnel and radial tunnel syndromes, although he was not willing to target claimant's job with Pitney Bowes as the causative factor.

Claimant's evaluation and treatment history is extensive, with claimant being evaluated, tested and/or treated by at least 18 health care providers. The ALJ accurately determined, with this extensive record, that an independent medical evaluation (IME) was appropriate. Claimant was referred by the ALJ to board certified cosmetic, reconstructive, breast and hand surgeon Gary L. Baker, M.D., for an evaluation on October 15, 2008. Claimant was diagnosed with right cubital tunnel syndrome, right carpal tunnel syndrome and right radial tunnel syndrome, and left shoulder limitations and left cubital tunnel syndrome. The ratings of Dr. Baker, reduced by the ratings from claimant's earlier settlement in 2000, are the basis for the award of the ALJ. As noted above, the parties have stipulated to the functional impairment ratings, including the deductions for preexisting impairments, reached by the ALJ in the Award. Dr. Baker found claimant's ongoing employment with Pitney Bowes to be both appropriate and recommended, and stated that claimant had no work restrictions applicable to either upper extremity.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[1]

[1] K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[2]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[3]

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[4]

Here, the ALJ found the appropriate date of accident to be the date the treating physician took claimant off work for right shoulder surgery on March 20, 2007. While it is argued that claimant suffered a specific trauma to the shoulder, the record indicates that claimant was having problems with the shoulder before the final traumatic act. Thus, this is more of a repetitive trauma injury than an acute injury. Therefore, K.S.A. 2006 Supp. 44-508(d) would apply. Prior to that date, claimant suffered problems with both upper extremities, including her hands, wrists and shoulders. These upper extremity problems began before claimant started working for respondent LabOne, and continued after the business was purchased by Quest and after claimant was terminated by Quest. The development of these many upper extremity conditions is discussed by many health care providers, but no consensus as to the cause or the timing is reached in this record. This record supports a finding that claimant's upper extremity problems in her hands, wrists, arms and shoulders were made worse while claimant worked for both LabOne and Quest. While it is true that claimant suffered physical damage to her upper extremities while

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[2] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[3] K.S.A. 2006 Supp. 44-501(a).

[4] K.S.A. 2006 Supp. 44-508(d).

working for both LabOne and Quest, K.S.A. 2006 Supp. 44-508(d) controls the date of accident when dealing with repetitive traumas. Here, claimant worked until one of her upper extremity difficulties required surgery and claimant was taken off work due to that condition. This establishes the date of accident in this matter. The liability for claimant's upper extremity injuries lies with Quest and its insurance company, Travelers.

Respondent Quest argues that claimant suffered intervening injuries while working for Pitney Bowes. The medical reports of Dr. Guinn detail repetitive work with Pitney Bowes causing additional trauma to claimant's upper extremities. However, claimant's testimony conflicts with the report of Dr. Guinn. Claimant testified that the work at Pitney Bowes was not repetitive and caused her upper extremities no additional difficulties. Additionally, Dr. Guinn questioned the timing of the development of both the cubital tunnel and radial tunnel syndromes in claimant's upper extremities. Plus, Dr. Guinn questioned claimant's activities during the period after her termination from respondent Quest and before she began working for Pitney Bowes.

The Board finds that this record does not prove that claimant suffered an aggravation of claimant's upper extremity problems while working for Pitney Bowes. Therefore, respondent Quest's allegation of intervening injuries during this employment is rejected. The Board finds the Award of the ALJ, assessing the liability in this matter for claimant's upper extremity injuries to Quest and its insurance carrier, Travelers, with a date of accident on March 20, 2007, is supported by this record and is affirmed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant suffered accidental injuries to her upper extremities in a series of accidents culminating on March 20, 2007, the date claimant was taken off work by the authorized treating physician for surgery.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Marcia L. Yates Roberts dated April 8, 2009, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The percentage of permanent impairment for each separate scheduled injury should be calculated separately according to the weeks on the schedule in K.S.A. 44-510d. Claimant is entitled to a separate permanent partial disability award for each scheduled injury rather than combining the ratings for each scheduled injury into the ratings for the right shoulder and for the left shoulder, as the majority has done.[5]

Before the Court of Appeals' decision in *Mitchell*, a majority of the Board believed that separate scheduled injuries should be compensated separately. We now have seemingly conflicting opinions from different panels of the Court of Appeals. In the *Mitchell* case, the Court affirmed a 3-to-2 decision of the Board where the then majority of the Board awarded a single scheduled injury award where the separate scheduled injuries to an extremity were combined. But in the *Conrow* case, decided just one week earlier, the Court of Appeals affirmed a decision by the Board where the separate

[5] See *Conrow v. Globe Engineering Co. Inc.*, No. 99,718, unpublished Court of Appeals opinion filed March 13, 2009); *Redd v. Kansas Truck Center*, No. 1,020,892, 2008 WL 4149955 (Kan. WCAB Aug. 27, 2008); and *Wilson v. Brierton Engineering, Inc.*, No. 1,024,659, 2007 WL 2937770 (Kan. WCAB Sept. 28, 2007).

scheduled injuries received separate awards. Here, the majority follows the *Mitchell* case instead of the *Conrow* case because *Mitchell* was a published decision. However, *Mitchell* did not expressly overrule *Conrow*. Rather, in each case the Court of Appeals simply approved the approach that had been followed by the majority of the Board. The undersigned would reconcile these two decisions by the Court of Appeals by interpreting them together to mean that either procedure is acceptable. In fact, the Court in *Mitchell* said "K.S.A. 44-510d **permits** compensation at the highest level of the scheduled injury . . . . (Emphasis added.)" The Court did not say that K.S.A. 44-510d requires that multiple scheduled injuries be combined. Therefore, the majority of the Board need not change just to follow *Mitchell*.

BOARD MEMBER

c: Sally G. Kelsey, Attorney for Claimant
Jason M. Lloyd, Attorney for Respondent LabOne, Inc., and its Insurance Carrier Liberty Mutual
Katharine M. Collins, Attorney for Respondent Quest Diagnostics and its Insurance Carrier Travelers
Marcia L. Yates Roberts, Administrative Law Judge